IN THE

Supreme Court of the United States

October Term, 1969

No. 1171

THE FIRST NATIONAL BANK OF SANTA FE
Appellant

v.

THE COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO
Appellee

On Appeal from the Court of Appeals of the State of New Mexico

MOTION TO DISMISS OR TO AFFIRM AND SUPPORTING BRIEF

JAMES A. MALONEY
Attorney General

GARY O'DOWD
Deputy Attorney General

Attorneys for Appellee
Supreme Court Building
P. O. Box 2246
Santa Fe, New Mexico 87501
Telephone: (505) 827-2844

JUSTIN REID
Assistant Attorney General
Of Counsel

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v.

THE COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO

Appellee

On Appeal from the Court of Appeals of the State of New Mexico

MOTION TO DISMISS OR TO AFFIRM

Appellee moves to dismiss the appeal or, in the alternative, to affirm the decision below, on the ground that there is no substantial federal question presented, in that:

I – The results reached by the Court below are highly consistent with the long-established policy of competitive equality between state and national banks and legislative enactments both by Congress and the New Mexico Legislature while this case was pending confirm those results;

II – The decision below does not rule on the question of the authority of national banks to provide data processing services to banks and others and pending cases in federal courts meet this *ultra vires* issue head-on and offer the most direct and appropriate way of determining the issue; and

III – The Appellant Bank is not the "real taxpayer" or, at least, has suffered no economic burden for the tax, due to the agreement to pass the tax on to the consumer banks.

Jurisdiction

This motion to dismiss or to affirm is filed under Rule 16 of the Court to question the substantiality of the federal question raised by Appellant's Jurisdictional Statement (Juris. Stmt.) filed herein on 11 February, 1970. Lack of a substantial federal question is a recognized basis for the Court to dismiss appeals prosecuted, as this one is, under 28 U.S.C. Sec.1257(2), 2101(c), or to affirm the results below. [Rule 16 1.(b)(c)].

Questions Presented

1. Where a state has imposed upon a national bank gross receipts taxes on electronic data processing services performed by it for other banks, is a substantial federal question presented on appeal under 28 U.S.C. Sec.1257(2), 2101(c) –

a. when the results reached by the Court below are highly consistent with the long-established policy of competitive equality between state and national banks and legislative enactments both by Congress and the New Mexico Legislature while this case was pending confirm those results;

b. when the decision below does not rule on the question of the authority of national banks to provide data processing services to banks and others and pending cases in federal courts meet this *ultra vires* issue head-on and offer the most direct and appropriate way of determining the issue; and

c. when the Appellant Bank is not the "real taxpayer" or, at least, has suffered no economic burden for the tax, due to the agreement to pass the tax on to the consumer banks?

Statement

Basis for the decision below.

The New Mexico Court of Appeals based its decision in this case on two grounds:

"(1) The services here involved are not reasonably necessary or incident to the business or functions of a national bank, and, therefore, are not immune from taxation under the provisions of 12 U.S.C. Sec. 548 (1964).

"(2) In any event, the Bank is not the 'real taxpayer'." (Juris. Stmt. p.13a)

Nowhere in the majority opinion below is it held that the Appellant Bank in this case was performing services *ultra vires* its charter under the National Bank Act [12 U.S.C. Sec.24(7)]. Indeed, it was Appellant's contention both before the Commissioner of Revenue and in the Court of Appeals that Appellee had no standing to raise the issue (Appendix A, infra p. A-1) and Appellee conceded the point for purposes of this case (Appendix A, infra p. A-1).

The decision below represents, rather, an interpretation of federal law and decisions of this Court resulting in the conclusion that:

". . . Congress does not intend that the performance of these services may not be taxed by a state. It seems illogical to us to hold that Congress intended to limit a state's taxation on functions or services performed by national banks, when such functions or services are clearly not necessary, and not reasonably incident, to the execution of the powers conferred by Congress thereon." (Juris. Stmt. p.4a).

The Court of Appeals based this conclusion on three specific factors, which it stated as follows:

1. "[t]he fact that the enumerated powers of a national bank do not include the performance of such services for other banks;

2. "the fact that Bank Service Corporations are expressly empowered to perform such services for banks;" and

3. "the fact that Congress has not limited the taxation by a state of Bank Service Corporations. . ." (Juris. Stmt., p.4a)

The Court below did not go into the question of whether national banks have implied or incidental authority under 12 U.S.C. Sec.24(7) to render data processing services to banks and others. Nor did it make any mention of the affirmative ruling of the Comptroller of Currency on the subject (Comptroller's *Manual for National Banks*, Rulings, Sec.3500.) In fact, the Comptroller's ruling was not referred to in the briefs or in argument of counsel submitted to the Court.

The decision below is, therefore, not a direct and specific ruling on the issue of *ultra vires* activities. In not ruling on that issue (nor on the preliminary question of standing to raise it) the Court of Appeals has, in effect, said that the *ultra vires* issue is not the basis for its decision. The real basis is clearly stated in the following language from the Court's opinion:

> "We are of the opinion that the question of the propriety of the imposition of a tax on an activity or service performed by a national bank should be determined on the basis of whether the activity or service is reasonably related or incidental to the accomplishment of its bank functions." (Juris. Stmt. p.6a).

In this connection, we refer the Court to the following stipulated facts in the record below quoted in the opinion of the Court of Appeals:

> "Electronic data processing of such accounts is a convenience but not a necessity for the conduct of the banking functions of any of the banks. It is a service made available commercially by non-banking institutions in Albuquerque and elsewhere." (Juris. Stmt., p.2a, 3a).

Legislation consistent with the ruling below.

The Appellant Bank's claim for refund was filed in Appellee's office on August 5, 1968 and the claim was denied on December 13, 1968 (Juris. Stmt. p.18a). Appellant appealed directly

to the New Mexico Court of Appeals on January 7, 1969.

While the case was pending on appeal, the New Mexico Legislature changed the state's choice of method under 12 U.S.C. Sec.548 in taxing national banks. (Ch.151, Laws of 1969, enacted April 1, 1969, and effective June 22, 1969 for fiscal years beginning after January 1, 1969; see Appendix B, p. B-1). The change was from taxing the shares of such banks to taxing their net income. By section 6 of the new law the tax on net income is specifically stated to be:

> ". . . in lieu of all other taxes imposed by the state and its political subdivisions upon banks and financial corporations for calendar year 1969 and all subsequent years, except taxes upon their real property and taxes arising from activities which are not in the course of their regular banking and financial corporation functions." (Appendix B, p.B-2).

This law applies equally to state chartered banks. (Section 72-15B-2 B., Appendix B, p.B-1).

On September 5, 1969, the Court of Appeals rendered its decision. (Juris. Stmt. p.1a). It became final on October 15, 1969, when the New Mexico Supreme Court denied certiorari (Juris. Stmt. p.16a).

Meanwhile, there were introduced in Congress proposed amendments to 12 U.S.C. Sec.548 which in final form, expressly provided that a state could impose on a national bank taxes such as those imposed in this case, so long as it was "in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such state." This legislation became law on December 24, 1969, when signed by the President, and became effective on January 1, 1970. (P.L. 91-156, 91st Cong., 1st Session (1969), see Juris. Stmt. p.27a, n.)

During all times material to these proceedings, state chartered banks in New Mexico were and are equally subject to the gross

receipts tax imposed on Appellant in this case. (Sec.72-16A-4 and Sec.72-16A-12.8, N.M.S.A., 1953 Compilation; see Juris. Stmt. pp.29a, 30a).

Pending federal cases raising ultra vires issue.

As has been pointed out in Appellant's Jurisdictional Statement (pp.15, 16), at least two cases in the federal courts, both reaching this Court on "standing" questions, raise directly the issue of whether or not national banks are lawfully authorized to provide data processing services to banks and others. The validity of the ruling of the Comptroller of Currency is squarely involved.

One such case is *Associated Data Processing Service Organizations, Inc., et al. v. William B. Camp, Comptroller of Currency, et al.*, (CA-8, 1969) 406 F.2d 837, cert. gtd. 395 U.S. 976 (1969). On certiorari, this Court ruled on March 3, 1970, that petitioner had standing to challenge the bank's authority and the Comptroller's ruling. The case was remanded for a hearing on the merits.

Another such case is *Arnold Tours, Inc., et al., v. Camp, et al.*, (CA-1, 1969) 408 F.2d 1147, in which petitions for writs of certiorari on the "standing" question under the titles *Industrial Nat'l. Bank v. Wingate Corp.*, (No. 129, Oct. Term, 1969), and *Camp v. Wingate Corp.*, (No. 225, Oct. Term, 1969) were denied by the Court on March 23, 1970. These proceedings, too, involve the issue of whether national banks are prohibited from directly entering into the data processing service business.

Both the *Association* and *Wingate* cases involve a head-on confrontation between national banks, supported by the Comptroller of Currency, and commercial data processing businesses over the *ultra vires* issue. Neither have been yet fully tried on the merits.

Reasoning and Precedents

As is stated in the motion, there are three good reasons why this appeal does not present a substantial federal question. We will discuss them here in order.

I

The results reached by the Court below are highly consistent with the long-established policy of competitive equality between state and national banks and legislative enactments both by Congress and the New Mexico Legislature while this case was pending confirm those results.

At the outset we emphasize that Appellant Bank has stipulated in this case that:

> "Electronic data processing of such accounts is a convenience but not a necessity for the conduct of the banking functions of any of the banks. It is a service made available commercially by non-banking institutions in Albuquerque and elsewhere."

As has been shown (Statement, p. 2, supra) the basis for the decision below was an interpretation of 12 U.S.C. Sec.548, prior to the 1969 amendment, that Congress did not intend such non-banking activities on the part of national banks to go untaxed by the state simply because of the bank's status as a federally chartered organization.

The Court of Appeals distinguished this Court's decisions in *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968) and related cases. The ground for the distinction was that those cases did not involve commercial non-banking services and, further, that they did not involve activities as to which Congress had specifically acted in authorizing Bank Service Corporations [12 U.S.C. Ch.18 (1964)] to perform data process-

ing service for banks without limitation as to state taxation.

This distinction and the lower court's ruling was entirely consistent with the policy of "competitive equality" between state and federal banks which has for years been "firmly embedded in the statutes governing the national banking system." *First National Bank v. Dickinson*, 396 U.S. 122 (1969).

Under New Mexico law (Juris. Stmt. p.29a) there is no doubt that state banks, at the time of the levying of the taxes involved in this case, were subject to the same gross receipts tax on the same kind of services. They continue to be so subject (Juris. Stmt. pp.29a, 30a).

Appellant asserts (Juris. Stmt. p.9) that the lower court's ruling subjects it to "disabling and openly discriminatory" taxation. We suggest to the Court that this is patently untrue. On the contrary, the ruling places both state and national banks on equal competitive footing as to state taxation of gross receipts from data processing services for banks and others. It does the same thing between national banks and bank service corporations as to state taxation of such services for banks alone.

As Mr. Justice Marshall points out in his dissenting opinion in the *First Agricultural Nat'l. Bank* case (392 U.S. p.360), ". . . the purpose of the section [12 U.S.C. Sec.548] was to insure competitive equality of the banks with other business. . ."

That the decision of the Court of Appeals is obviously in conformity with the underlying statutory policy of "competitive equality" in the banking field is further borne out by the confirming legislation of both Congress and the New Mexico Legislature during the time when this case was being decided below. (Statement, p.4, supra).

These enactments are, we suggest, remarkably harmonious in their application to the fact situation presented by this case.

New Mexico says on the one hand: "Our gross receipts tax applies to all bank activities not in the regular course of banking functions." Congress says on the other hand: "That's fine, so long as you treat national banks the same as state banks."

We further suggest to the Court that these enactments are, insofar as they apply to a case such as this, a restatement of existing law, as analyzed and stated by the Court of Appeals. And, in view of Appellant's admission that data processing services for other banks are not necessary to the performing of its banking functions, and therefore not rendered in the course of regular banking functions, it would seem clear that there is no substantial federal question presented for review.

For this reason, the case would seem to be one in which a Motion to Affirm is well-taken.

II

The decision below does not rule on the question of the authority of national banks to provide data processing services to banks and others and pending cases in federal courts meet this ultra vires issue head-on and offer the most direct and appropriate way of determining the issue.

Appellant, in its Jurisdictional Statement (pp.12, et seq.) has taken great pains to assert that the decision below is a direct ruling on the authority of national banks to engage in the data processing business. From this, Appellant urges the Court to accept jurisdiction and settle the *ultra vires* issue, including the question of the validity of the ruling of the Comptroller of Currency.

We think the assertion is in error and that a fair reading of the opinion below reveals that there was no such ruling (see Statement, p.4, supra). That the dissenting opinion below (Juris. Stmt. p.14a) so characterizing the majority ruling does not aid

Appellant because that, too, we believe, is a misreading of what the majority said.

It is firmly established law that this Court will not undertake review of an asserted federal question in cases such as this unless the state court has in fact directly ruled on the question. *Northwestern Bell Tel. Co. v. Nebraska State Ry. Comm.*, 297 U.S.471, 56 S.Ct. 536, 80 L.Ed. 810 (1936); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

There being no express ruling on the *ultra vires* issue below, we suggest the Court should decline to review that question here.

Such a result is strongly supported by the fact that pending cases in the federal courts (Statement, p.6, supra), in which the Comptroller of Currency is a party, directly raise the authority question under circumstances bringing business competitors into head-on confrontation. These would appear to be preferable forums in which to resolve the conflict.

It should also be noted that the issue of whether national banks are constitutionally immune from state taxation as federal instrumentalities was not decided below. Cf. *Liberty Bank & Trust Co. v. Buscaglia*, 21 N.Y.2d 357, 235 N.E.2d 101 (1968), rev'd., 23 N.Y.2d 933, 246 N.E.2d 361 (1969) cert. den. 396 U.S. 941.

III

The Appellant Bank is not the "real taxpayer" or, at least, has suffered no economic burden for the tax, due to the agreement to pass the tax on to the consumer banks.

The Court of Appeals ruled, alternatively, that Appellant Bank was, in this case, not the "real taxpayer". In doing so, it relied on *Colorado National Bank v. Bedford*, 310 U.S. 41, 60 S.Ct. 800, 84 L.Ed. 1067 (1940). We refer the Court to the lower Court's analysis and conclusion (Juris. Stmt. pp.10a–13a). While

it is true that, in *Bedford*, the Colorado law required the tax to be passed on and in New Mexico the pass-on is simply permitted, the *fact* of passing the tax on should be given significance in determining who is the "real taxpayer" for purposes of a claimed immunity under 12 U.S.C. Sec.548.

We also suggest that some significance should be given to the New Mexico compensating tax provisions (Sec.72-16A-10, N.M.S.A., 1953 Compilation; see Appendix B, p.B-3, infra). By its terms, this statute applies to anyone who "sells property or sells property and service" for use in New Mexico and who is not subject to the gross receipts tax on such sales. The seller is required to collect the tax from the consumer and pay it to the state. [Cf. *Northwestern National Bank of Sioux Falls v. Gillis*, 825 S.D. 457, 148 N.W.2d 293 (1967); also the dissent of Mr. Justice Harlan, *First Agricultural*, supra, at 392 U.S. p.363. While the applicability of the compensating tax provisions was not raised or ruled upon below, the statute is part of the usual legislative pattern in this field of taxation. It is, in practical effect, a compulsory pass-on provision designed to avoid technical "incidence of tax" arguments.

Whether the compensating tax applies or not, however, we suggest that the consumer banks in this case were the "real taxpayers".

A last consideration is the fact that in reality Appellant will suffer no economic burden from the imposition of this tax, having passed it on by contract to the consumer banks (Juris. Stmt. p. 21a, paragraphs 16 and 17).

True, the contract refers to taxes "lawfully" assessed. Such will, of course, be the case if this Court declines jurisdiction for lack of a substantial federal question and permits the decision below to stand as between the parties.

In view of the confirming legislation in both Congress and the New Mexico Legislature (Statement, p. 4, supra), there is no reason to expect the taxation issue to remain alive even if it should ultimately be held that national banks may lawfully engage in the data processing business. As has been pointed out, Appellant concedes that such activities are a "convenience" for the bank and not "essential to the performance of its banking function".

CONCLUSION

In summary, Appellee earnestly suggests to the Court that, for the reasons stated, this case does not present a substantial federal question for review and that the appeal should be dismissed or, in the alternative, that the decision below should be affirmed.

JAMES A. MALONEY
Attorney General

GARY O'DOWD
Deputy Attorney General

JUSTIN REID
Assistant Attorney General
Of Counsel

APPENDIX A

Appellant Bank's contention before the Court of Appeals was that the Commissioner had no standing to raise the *ultra vires* question, as is shown by Point II of its brief in that Court:

"Point II

THE CONTENTION OF ULTRA VIRES TRANSACTIONS IS NOT AVAILABLE TO THE COMMISSIONER".

Appellee's answer to this point on appeal was as follows:

"Appellee's Answer to Point II

THE POINT IS CONCEDED BUT DOES NOT AFFECT THE RESULT IN THIS CASE.

Appellee concedes for purposes of this case and on the basis of the authority cited by Appellant that it has no standing to assert a claim of ultra vires acts by Appellant.

But this does not affect the result. Appellee does not seek at this time to restrain or forbid the activities of Appellant, merely to apply its tax laws equitably."

APPENDIX B

Statutes

In 1969, the New Mexico Legislature enacted a new "Banking and Financial Corporations Tax Act", as follows:

72-15B-1. Short title.—This act [72-15B-1 to 72-15B-9] may be cited as the "Banking and Financial Corporations Tax Act."

72-15B-2. Definitions. As used in the Banking and Financial Corporations Tax Act [72-15B-1 to 72-15B-9]:

A. "affiliated group" means that term as it is used in the Internal Revenue Code;

B. "bank" means any national banking association, state bank, or bank holding company;

C. "financial corporation" means any savings and loan association, or any incorporated savings and loan company, trust company, mortgage banking company, consumer finance company or other financial corporation;

D. "fiscal year" means any twelve [12] month accounting period ending on the last day of any month other than December;

E. "Internal Revenue Code" means the United States Internal Revenue Code, as amended;

F. "net income" means that part of the taxpayer's income generally defined as federal taxable income and it shall be computed in the same manner as provided in the Internal Revenue Code for computing federal taxable income, except that the income from federal, state and municipal securities must be included in the computation of net income for the purposes of the Banking and Financial Corporations Tax Act. Net income does not include amounts that have been taxed as income to another member of an affiliated group of corporations under the Income Tax Act [72-15A-1 to 72-15A-15]; and

G. "taxable year" means the calendar year or fiscal year for which net income is computed. In the event a return is

made for a fractional part of a year, taxable year includes the period for which the return is made.

72-15B-3. Imposition of tax on banks measured by net income—Method of taxing national banking associations. —An annual tax measured by net income is imposed upon every bank located within this state. New Mexico expressly adopts method number four as authorized for the taxation of national banking associations in 12 USC Sec. 548.

72-15B-4. Financial corporations Imposition of tax measured by net income. An annual tax measured by net income is imposed upon every financial corporation located within this state.

72-15B-5. Rate of tax on banks and financial corporations—Minimum tax.—A. The rate of tax on banks and financial corporations shall be six per cent [6%] of net income.

B. The tax on banks and financial corporations shall not be less than one hundred dollars ($100) for each taxable year.

72-15B-6. Tax in lieu of other taxes Exceptions. The taxes imposed by sections 3 and 4 of the Banking and Financial Corporations Tax Act [72-15B-3, 72-15B-4] are in lieu of all other taxes imposed by the state and its political subdivisions upon banks and financial corporations for calendar year 1969 and all subsequent years, except taxes upon their real property and taxes arising from activities which are not in the course of their regular banking and financial corporation functions.

72-15B-7. Income allocation. A. At the election of a bank or financial corporation, net income may be allocated and apportioned as provided in the Uniform Division of Income for Tax Purposes Act [72-15A-16 to 72-15A-36].

B. Deductions and exemptions permitted in computing federal taxable income and not specifically allocated in the Uniform Division of Income for Tax Purposes Act shall be equitably apportioned in accordance with regula-

tions prescribed by the commissioner of the bureau of revenue.

72-15B-8. Excessive rate of tax—Relief. Every bank or financial corporation subject to the provisions of the Banking and Financial Corporations Tax Act [72-15B-1 to 72-15B-9] shall be relieved of liability for any tax imposed by sections 3 or 4 [72-15B-3, 72-15B-4] of the act to the extent that the tax rate on these institutions exceeds the highest of the rates imposed by the state upon mercantile, manufacturing and business corporations doing business within its limits. For the purposes of this section, "tax rate" means that term as it is used in 12 USC Sec. 548.

72-15B-9. Taxpayer returns. Every bank or financial corporation subject to the Banking and Financial Corporations Tax Act [72-15B-1 to 72-15B-9] shall file a return on a form prescribed by the commissioner of revenue. The return shall be filed with the bureau of revenue on or before the fifteenth day of the fourth month following the end of each taxable year. The tax imposed by the Banking and Financial Corporations Tax Act is due and payment is required on or before the date when the return is required to be filed.

The New Mexico compensating tax law provides in part, as follows:

72-16A-10. Agents for collection of compensating tax—Duties. A. Every person carrying on or causing to be carried on any activity within this state attempting to exploit New Mexico's markets, who sells property or sells property and service for use in this state and who is not subject to the gross receipts tax on receipts from these sales shall collect the compensating tax from the buyer and pay over the tax collected to the bureau. "Activity," for the purposes of this section, includes, but is not limited to, engaging in any of the following in New Mexico: maintaining an office or other place of business, soliciting orders through employees or independent contractors, canvassing,

demonstrating, collecting money, warehousing or storing merchandise or delivering or distributing products as a consequence of an advertising or other sales program directed at potential customers.

B. To insure orderly and efficient collection of the public revenue, if any application of this section is held invalid, the section's application to other situations or persons shall not be affected.

72-16A-12.9. Exemption—Compensating tax—Banks and financial corporations.—Exempted from the compensating tax is the use of property by banks and financial corporations if the property is used in the course of their regular banking and financial corporation functions.

This exemption provision was enacted by New Mexico Laws of 1969, Ch. 144, Sec. 14.